78-1181

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. ___

PATRICK BATT, Petitioner,

v.

MARION HEIGHTS, INC., et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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CITATIONS

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The petitioner, Patrick Batt, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on November 2, 1978.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit affirming the order of the District Court for the Eastern District of Wisconsin dismissing the petitioner's complaint is reported at 586 F.2d 59. A copy appears in the appendix hereto. A copy of the petitioner's complaint is also included.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 2, 1978. This petition for certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Is the action of a nominally private nursing home, in dismissing from employment its affirmative action officer, action under color of law, for purposes of 42 U.S.C. Sec. 1983 where it

receives the majority of its funding from governmental sources, including Hill-Burton, Medicare, Medicaid, and the Work Incentive Program, is regulated in every facet of its operation; and by being totally responsible for the care and welfare of its elderly residents has become the functional equivalent of a "company town".

2. Whether the instant complaint was properly dismissed for failure to affirmatively allege that "the governmental funding and regulations" have "fostered the challenged activities of [the] private health care facilities."

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

Sec. 1983

Every person who, under color of any statutes, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

Petitioner commenced this action against respondent Marion Heights, Inc., and its directors, Sister Lillian Van Domlen, Sister Rosalie Klein, Sister M. Mel O'Dowd, Sister Angiola Strickelmaier, Sister Peyton Ryan, Delores Gencuski, Mrs. A. Boehm, John Conway, Robert Hackett and Gerald Falci. Also named as a defendant was the administrator of Marion Heights, Inc., Roger N. Hamilton.

The suit was filed in the United States District Court for the Eastern District of Wisconsin, the Honorable Robert W. Warren, District Judge, presiding, seeking equitable relief and money damages for violations of 42 U.S.C. Sec.

1983, and the United States Constitution. Federal District Court jurisdiction was grounded on 28 U.S.C. Sec. 1343 and 28 U.S.C. Sec. 1331. The amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

Respondents filed a Rule 12(b)(1) and (6) motion to dismiss on the grounds that respondents had not acted under color of state law. In a memorandum decision and order dated Janaury 18, 1978, the District Court granted this motion. Final judgment was entered on January 25, 1978, dismissing the action.

Timely appeal was taken to the Court of Appeals for the Seventh Circuit. The case was argued before the court on September 15, 1978, and the lower court's order was affirmed by judgment entered November 2, 1978.

Petitioner Patrick Batt (Batt), seeks equitable relief and money damages for his unlawful

discharge from employment as personnel director of Marion Heights, Inc. (Marion Heights), solely because of his homosexual lifestyle.

Regarding state action, the complaint alleges that Marion Heights is a Wisconsin non-profit corporation operating a health care facility subject to extensive state regulation. (Complaint, Par. 7, Pet. App. p. 14). The majority of operating funds for Marion Heights is provided by the federal government to the State of Wisconsin, in the form of Medicare and Medicaid benefits. (Complaint, Par. 8, Pet. App. p. 14). Marion Heights participates in the WIN Employment Training Program, funded by the United States and administered by the State of Wisconsin. (Complaint, Par. 9, Pet. App. p. 15). The occupational and physical therapy programs at Marion Heights are funded by the United States Government. (Complaint, Par. 10, Pet. App. p. 15).

Respondent Hamilton, the administrator, is licensed by the State of Wisconsin as a health care administrator (Complaint, Par. 11, Pet. App. p. 15), and acting under the direction of the Board of Directors, caused plaintiff's termination. (Complaint, Pars. 14-16, Pet. App. pp. 17-19). The other named respondents are members of the Board of Directors and are responsible for plaintiff's termination. (Complaint, Pars. 14-16, Pet. App. pp. 17-19).

Batt was employed by Marion Heights as Personnel director from August 2, 1976, until his termination on May 6, 1977. As personnel director, Batt was responsible for the recruitment, placement and employment of the work force at the nursing home, for the management of the employees' relation program, for the coordination of the educational training programs at the facility, for wage and salary administration

and for the internal audit program. (Complaint, Par. 12, Pet. App. p. 16). More importantly, Batt, under Hamilton's supervision, was primarily responsible for the administration of various state and federal programs and regulations. (Complaint, Par. 13, Pet. App. pp. 16-12). Batt was the affirmative action officer for Marion Heights, primarily responsible under Hamilton's supervision for Marion Heights' compliance with EEO regulations and litigation. Batt was primarily responsible for Marion Heights' compliance with OSHA regulations; and was primarily responsible for administration of the WIN Program at Marion Heights. (Id.)

Batt alleged that respondents' actions deprived him of freedom of speech and association, of the right to privacy, of equal protection of the law, and the due process of the law, all in violation of the First, Fourth, Fifth, Ninth and

Fourteenth Amendments to the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. RESPONDENT, MARION HEIGHTS, ALTHOUGH NOMINALLY A PRIVATE HEALTH CARE FACILITY, IS, FOR THE PURPOSES OF SEC. 1983, A PUBLIC ENTITY DUE TO ITS HEAVY GOVERNMENTAL FUNDING, PERVASIVE REGULATORY SCHEME AND APPLICABLE PROVISIONS OF STATE LAW WHICH CONVERT IT TO A STATE AGENT IN CERTAIN INSTANCE. FURTHERMORE, THE RESPONDENT PERFORMED A PUBLIC FUNCTION IN THE CARE OF ITS ELDERLY AND INFIRM RESIDENTS AND AS A PROVIDER OF EMPLOYMENT TRAINING AND OPPORTUNITIES FOR WELFARE RECIPIENTS AND UNEMPLOYED PERSONS.

There are several avenues to a finding of state action for Sec. 1983 purposes. Jackson v. The Statler Foundation, 496 F.2d 623 (2d Cir. 1974), sets forth an oft-quoted analysis as follows:

> "(1) The degree to which the 'private' organization is dependent on governmental aid;
>
> "(2) The extent and intrusiveness of the governmental regulatory scheme;

> "(3) Whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation;
>
> "(4) The extent to which the organization serves a public function or acts as a surrogate for the state;
>
> "(5) Whether the organization has legitimate claims to recognition as a 'private' associational or other constitutional terms." Id. 496 F.2d at 629.

Petitioner urges that under those standards Marion Heights was acting under color of law in dismissing Batt from its employ.

Marion Heights' operating budget is derived from state and federal funding. Batt contends that the public support of the nursing home has reached the level where it is "so heavily dependent on the State as to be considered the equivalent

of a public [institution] for all purposes and in all of its activities." Cohen v. Illinois Institute of Technology, 524 F.2d 818 (7th Cir. 1975) cert. denied, 425 U.S. 943 (1976).

Accompanying the governmental funding is a comprehensive regulatory scheme which oversees every aspect of respondent's operation. See, e.g., Wisconsin Administrative Code H 32; 42 U.S.C. Sec. 1396 et. seq. While the mere existence of detailed regulations does not make every act of the "private entity" action of the State, Cohen, 524 F.2d at 825, it does make such a private entity more susceptible to a finding of state action. Jackson v. Metropolitan Edison Company, 419 U.S. 345, 351 (1974).

The third factor in a state action analysis was examined in Jackson v. Metropolitan Edison Company, 419 U.S. at 351:

> "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

See also, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

The Seventh Circuit cases with regard to this factor "the nexus requirement" have exceeded the Supreme Court standards. Cohen states the rule in the Seventh Circuit:

> "Unless it is alleged that the regulatory agency has encouraged the practice in question, or at least given its affirmative approval to the practice, the fact that a business or an institution is subject to regulation is not of decisive importance." Id., 524 F.2d at 826.

Complaints which fail to allege such a "nexus" are being uniformly dismissed at the district court level in the Seventh Circuit, e.g., Doyle v. Unicare Health Care Services, Inc., 399 F. Supp. 69 (N.D. Ill. 1975), aff'd. mem. 541 F.2d 283 (7th Cir. 1976).

The decision of the Seventh Circuit in this case adheres to the Cohen rationale that the sole route to a finding of state action on the part of a heavily regulated "private" entity is through a finding of state encouragement or control of the challenged activity. (Pet. App. p. 5).

Petitioner's complaint does contain sufficient allegations to meet the "nexus" requirement. Batt was employed by Marion Heights to ensure its compliance with the realm of governmental regulations applicable to it. He supervised respondent's participation in the WIN Program. He was responsible for compliance with OSHA regulations. As a recipient of Medicare and Medicaid benefits, Marion Heights was required to maintain an affirmative action program. Batt was the affirmative action officer.

Respondent employed Batt, as it was required to do, to ensure that it obeyed federal and state

law. It, in turn, must not be allowed to set criteria for such a "private policeman" that contravene federal law, because the practice of the policeman will affect the nature of the compliance.

An examination of Supreme Court opinions reveals that the Seventh Circuit is erroneously excluding other viable routes to a finding of state action when dealing with a governmentally regulated "private" institutions.

For example, in Jackson v. Metropolitan Edison Company, 419 U.S. at 352-53, this court stated that a private entity would be acting under color of law when it exercises delegated powers "traditionally associated with sovereignty." The court in Burton indicated that a consideration of all relevant factors, in light of the facts and circumstnces of each case, must be undertaken in any state action analysis. See also, Jackson v. The Statler Foundation, 496 F.2d at 629. The singular

approach followed by the Seventh Circuit leads to the erroneous conclusion that no state action exists when in fact governmental regulation and/or funding has reached the point where an otherwise private insitution is converted into a public institution for constitutional purposes. See Ward v. St. Anthony's Hospital, 476 F.2d 671, 675 (10th Cir. 1973).

Petitioner contends that the court below gave only cursory treatment to the fourth factor in the state action analysis: "The extent to which the organization serves a public function or acts as a surrogate for the State." Jackson v. The Statler Foundation, 496 F.2d at 629.

In Evans v. Newton, 382 U.S. 296, 299 (1966), this court stated:

> "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state actions."

Batt is aware that actions of private hospitals have frequently been challenged under Sec. 1983 and that the courts are divided in their response to such challenges. Compare, Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973); with Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964). However, Batt contends that this court should examine the conduct of nursing homes in a somewhat different light than that of private hospitals.

Nursing homes are often a permanent and final residence for many elderly citizens. Surely a "private" nursing home could not ignore the constitutional rights of its residents. Batt argues that the rationale employed by the Court in Marsh v. Alabama, 326 U.S. 501 (1946), and subsequent "public function" cases, Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308

(1968); Terry v. Adams, 345 U.S. 461 (1953); and Evans v. Newton, 382 U.S. 296 (1966), should be considered in this instance.

While geographically not a town as in Marsh, nor a business district as in Logan Valley, realistically, for its patients, the nursing home is their town, their community. A nursing home provides its residents with all the essential services that the company town did in Marsh. Moreover, the primary source of funding for these services is the government via Medicare, Medicaid and lenient tax treatment afforded the nursing home.

Petitioner urges this court to consider Justice Black's statement in Marsh v. Alabama:

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the

> statutory and consitutional rights of those who use it." Id. 326 U.S. at 508.

The court below held that the petitioner's public function argument must fail because the "[c]are of the elderly and infirm has traditionally been a function associated with the family, not with sovereignty." The court cited this court's recent decision in Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, (1978) and concluded that petitioner's complaint failed to meet both the standards espoused by the majority in Flagg Brothers: "traditionally and exclusively a state function", and the standard espoused by the four dissenting justices: "traditionally and historically associated with sovereignty." Batt, 586 F.2d at 63. (Pet. App. p. 8).

Petitioner respectfully submits that the conclusion of the Seventh Circuit is erroneous in

two respects. First, it directly conflicts with decisions from other circuits wherein a private insitution charged with welfare-related duties, such as care and education of the indigent, has been found to be acting with a public purpose and performing a public function.

In Robinson v. Price, 553 F.2d 918 (5th Cir. 1977), the court distinguished Jackson v. Metropolitan Edison Company on the basis that Jackson did not involve "the exercise by a private entity of powers or functions traditionally associated with sovereignty. The handling of welfare-related problems, however, has been a function that has been traditionally dealt with by the state." Robinson, 553 F.2d at 920.

The Ninth Circuit voiced similar sentiments in Ginn v. Mathews, 553 F.2d 477 (9th Cir. 1976), wherein it stated:

> "[W]hen a specific governmental function is carried out by heavily subsidized private firms for individuals whose freedom of decision-making has, by contract and the reserved governmental power of continuing oversight, been circumscribed substantially more than that generally accorded an independent contractor, the coloration of state action fairly attaches." Id. at 481 (quoting McQueen v. Druker, 438 F.2d 781 (1971)) (discussing the Federal Headstart funding of a private entity).

The public function theory was also applied in Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974):

> "In certain circumstances the actions of private entities may be considered to be infused with 'state action' if those private entities are performing a function public or governmental in nature and which would have to be performed by the Government but for the activities of the private parties." Id. 499 F.2d at 765.

In Wisconsin, providing medical care and services to the needy is an essential public function. Even before state and federal medical assistance programs, Wisconsin courts have held that non-profit, private hospitals "perform a quasi-public function in administering to the poor and the sick" and liken those services to the exercise by a municipality of a governmental function. Morrison v. Henke, 165 Wis. 166, 116 N.W. 173 (1917). In Mercy Medical Center v. Winnnebago County, 58 Wis.2d 260, 206 N.W.2d 198 (1973), the Wisconsin Supreme Court held that "the health of individual citizens is a legitimate public concern" and that "today's cost of medical and hospital care has reached such heights that the means of payment necessitate such social devices as Medicare, medical and hospital insurance, and public relief." Id. 58 Wis.2d at 268, 206 N.W.2d at 201.

Legislative approval of this public nature of health care in Wisconsin is evidenced by Chapter 231 of the Wisconsin Statutes. According to Sec. 231.05(1), ". . .[I]t is the intent of the legislature to provide assistance and alternative methods of financing to non-profit health institutions to aid them in providing needed health services consistent with the state's health plan." Participating health facilities may be appointed an agent of the state health authority for funding purposes. Under such circumstances Marion Heights is, by statutory definition, an agent of a "public instrumentality. . . perform[ing]. . . an essential public function." Sec. 231.02(1), Wis. Stats.

Federal courts must look to state law to determine whether certain activities undertaken

by private institutions are in fact state functions. Jackson v. Metropolitan Edison Company, 419 U.S. at 353. It is clear from Wisconsin law that private nursing homes provide an essential, delegated public function.

Cases holding that private colleges and universities are not veiled with a public function are not controlling in the health care field. There is no analagous legislative provision for a unitary educational system. This is not the case in the area of health care, especially health care for the elderly.

In the field of mental health care a private hospital has been recognized as performing a "public function". In Ruffler v. Phelps Memorial Hospital, 453 F. Supp. 1062 (S.D. N.Y., 1978), the fact that "the State expressly depends on the use of private facilities to effectuate its public policy of providing treatment for those

who need it" led to a finding of state action on the part of a private mental hospital. Id. 453 F. Supp. at 1067. A private mental hospital is not unlike a private nursing home in that both provide long-time twenty-four hour total care for its patients. Both perform an essential function which, if they did not, must be assumed by the State.

Secondly, the concept of "public function" is not a static and inflexible notion. As the size and complexity of society has grown, it cannot be disputed that government has assumed growing responsibilites formerly dealt with by the private sector. The private nursing home has become an integral part of the public welfare scheme and should be recognized as such.

In addition to the public functions performed by respondent with regards to its residents, the

nursing home has also involved itself in other governmental activities which lend support to a finding of state action.

Under the Federal Work Incentive Program (WIN), Title IV of the Social Security Act, respondent receives federal and matching state funds and tax credits to subsidize employment and training of welfare recipients. According to 45 CFR Sec. 224.13, a participating non-profit private employer must be one "organized for a public purpose." (Emphasis added). See also, 45 CFR Sec. 224.40(c)(4): "An eligible employer. . .any private nonprofit organization established to serve a public service." (Emphasis added).

Respondent, by virtue of Title VII and its status as a federal contractor, is also required to establish and implement affirmative action guidelines. Provisions such as the WIN Program, and

affirmative action programs dealing with work training and employment for the indigent, unemployed and minorities constitute services traditionally reserved to the state. Respondent, in exchange for liberal tax benefits and governmental funding, performs these services for the state. Petitioner was primarily responsible for the administration of both the WIN and affirmative action programs at Marion Heights. His discharge must be subject to constitutional scrutiny in view of his intimate involvement with the respondent's participation in the governmental programs.

The fifth area of inquiry under the Statler Foundation analysis involves a balancing between the right of a "private" insitution to retain its private status and the nature of the right infringed upon. Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975). Respondent's claim to retain its private status pales in comparison to

the fundamental consitutional rights of petitioner which it has violated. Wahba v. New York University, 492 F.2d 96 (2d Cir. 1974), cert. denied, 419 U.S. 874 (1974); Weise v. Syracuse University, 522 F.2d at 405.

No substantial private interests are involved in this case. Respondent, by entering the nursing home field, voluntarily submits to multitudinous governmental regulation. It provides health care services in the same manner as any other public health care facility. Any claim to private status is miniscule. On the other hand, petitioner represents a substantial minority of citizens who stand to suffer permanent exclusion from employment.

The clear trend is to provide consitutional protection for homosexuals, at least where sexual preference does not have a detrimental effect upon the employment relationship. Federal courts have been almost unanimous in reversing discharges

involving civil service employees dismissed on the grounds of homosexuality. See, Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965). In response to such litigation, the Civil Service Commission has recently promulgated guidelines forbidding discharge of homosexuals solely on the basis of homosexuality. U.S. Civil Service Commission, F.P.M. Letter 731-3 (July 3, 1975), 44 U.S.L.W. 2032 (1975).

II. THE DECISION BELOW CONFLICTS WITH THE LAW IN OTHER CIRCUITS AS TO WHETHER THE RECEIPT OF FEDERAL FUNDS UNDER THE HILL-BURTON ACT BY A HEALTH CARE FACILITY RENDERS SUCH RECIPIENT A GOVERNMENT INSTRUMENTALITY SO THAT ITS ACTIONS ARE GOVERNED BY THE CONSTITUTIONAL REQUIREMENTS GENERALLY APPLICABLE TO THE STATE AND FEDERAL GOVERNMENT.

This case presents the Courts with yet another opportunity to resolve a 15-year old conflict among the several circuits.

In Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964), the Fourth Circuit took the position that receipt of Hill-Burton monies was sufficient to convert an otherwise private health care facility into a public one for purposes of the Fourteenth Amendment. This remains the law in the Fourth Circuit. See also Sams v. Ohio Valley General Hospital Association, 413 F.2d 826 (4th Cir. 1969). The reasoning of the Fourth Circuit has also been followed by district courts in other circuits, e.g., Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (E.D. Pa. 1970).

A contrary view has been taken by at least three other Circuits: Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973); Jackson v. Norton-Children's Hospital, Inc., 487 F.2d 502 (6th Cir. 1973). This conflict

in the law should not be allowed to continue. Such diverse interpretations of the effect of a federal program clearly runs contrary to the idea that all citizens are to be treated alike in the eyes of the law. In this instance, the geographic location of the "eyes of the law" is determinative of the fate of the constitutional rights being threatened.

Such fundamental inequity demands that this court "consistent with a responsible exercise of its certiorari jurisdiction" resolve the conflict. Taylor v. St. Vincent's Hospital, cert. denied 424 U.S. 948 (1976) (Mr. Justice White and Chief Justice Burger dissenting from denial of certiorari).

III. "STATE ACTION" DECISIONS OF THE SEVENTH CIRCUIT HAVE IMPOSED OVERLY STRICT PLEADING REQUIREMENTS RESULTING IN THE ERRONEOUS DISMISSAL OF PETITIONER'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

In Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, this court, in addressing the issue of state action said: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

More recently in Jackson v. Metropolitan Edison Company, 419 U.S. 345, 351, Mr. Justice Rehnquist wrote: "The true nature of the state's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met."

Those statements are consistent with the well-established rules of notice-pleading. A complaint must not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45 (1957).

Complaints against nominally private institutions and allegations of state action present a difficult judicial task upon a motion to dismiss. Findings of state action rest totally on the unique factual circumstances of each case. Courts "cannot decide in the abstract or in a vacuum the issue of whether sufficient state action exists to impregnate private conduct with governmental character so as to proscribe that conduct under the Fourteenth Amendment." Pitts v. Department of Revenue, 333 F. Supp. 662, 669 (E.D. Wis. 1971). See also, Gilmore v. Montgomery, 417 U.S. 556 (1974), where this court after citing the Burton requirement of "sifting the facts. . .to determine the nonobvious involvement of the State", remanded a state action to the district court level for factual development.

The Court below upheld the dismissal of petitioner's complaint, holding that it "fail[ed]

to allege any set of facts supporting the conclusion or inference that defendants have either acted as a state instrumentality, performed traditionally exclusively sovereign functions, or been compelled or even encouraged by the state to make the decisions challenged in these suits." 586 F.2d at 63, (Pet. App. pp. 8-9).

Petitioner respectfully submits that the Seventh Circuit erred in its dismissal. This case is unique both in terms of governmental involvement with respondent and the constitutional rights claimed by the petitioner. Petitioner suggests that the court should have heeded the words of the Third Circuit in Braden v. University of Pittsburgh, 447 F. 2d 1 (3rd Cir. 1973):

> "It would perhaps be possible for us to decide this last issue state action on the present record but we think we should not do so. Very important constitutional questions are presented and the Supreme Court has repeatedly informed us that such difficult issues

> should not be decided exempt upon a full record and after adequate hearing." Id., 447 F. 2d at 4.

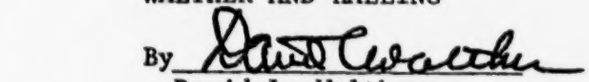
The court below, by imposing overly strict pleading requirements has made it nearly impossible to achieve reasoned results in the already difficult area of state action. Inequitable and premature dismissals of serious claims of constitutional violations leave petitioner and other claimants without any means of judicial recourse.

CONCLUSION

For these reasons, a writ of certiorari should issue to reivew the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

WALTHER AND HALLING

By 
David L. Walther

John Sundquist

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1216

PATRICK BATT,

Plaintiff-Appellant,

v.

MARION HEIGHTS, INC., SISTER LILLIAN VAN DOMLEN, SISTER ROSALIE KLEIN, SISTER M. MEL O'DOWD, SISTER ANGIOLA STICKELMAIER, SISTER PEYTON RYAN, DELORES GENCUSKI, MRS. A. BOEHM, JOHN CONWAY, ROBERT HACKETT, GERALD FALCI, and ROGER N. HAMILTON,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 77-C-380—**Robert W. Warren**, *Judge.*

No. 78-1248

STEPHEN J. KAVKA, M.D.,

Plaintiff-Appellant,

v.

EDGEWATER HOSPITAL, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-3378—**Joseph S. Perry**, *Judge.*

(*Caption continued on following page*)

No. 78-1302
JOSEPH MUSSO,

Plaintiff-Appellant,

v.

RAFFAELE SURIANO, Dean, Loyola University School of Dentistry, JOHN MADONIA, Associate Dean, Loyola University School of Dentistry, and LOYOLA UNIVERSITY SCHOOL OF DENTISTRY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-4014—**George N. Leighton**, *Judge.*

ARGUED SEPTEMBER 15, 1978—DECIDED NOVEMBER 2, 1978

Before SPRECHER, *Circuit Judge*, NICHOLS, *Judge** and BAUER, *Circuit Judge.*

SPRECHER, *Circuit Judge.* These three cases have been consolidated for opinion on the recurring issue of when the actions of a private entity can properly be characterized as occurring "under color of state law" allowing maintenance of an action under 42 U.S.C. § 1983.

I

In all three cases, the district court granted defendant's motions to dismiss the complaints for lack of subject matter jurisdiction. In each case the district court held that there were insufficient allegations of state or federal action.[1]

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* Honorable Philip Nichols, Jr., Associate Judge, United States Court of Claims, is sitting by designation.

[1] Allegations of governmental action are necessary to confer federal jurisdiction under 28 U.S.C. § 1343. *See* note 8 *infra.*

In *Batt v. Marion Heights, Inc.*, plaintiff Patrick Batt brought suit for damages against the defendant nursing home, its Board of Directors and an individual serving as administrator of the facility. Batt had been employed by Marion Heights as personnel director. On May 6, 1977, Batt was discharged, allegedly for the sole reason that he was a homosexual. Batt claims his dismissal on this ground deprived him freedom of speech and association, his right to privacy, due process, and equal protection in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. In support of his charge that he was terminated "under color of state law," Batt relies principally on two factors: 1) Marion Heights receives extensive state and federal funding under Medicare and Medicaid as well as through specific governmental programs; and 2) Marion Heights is regulated and licensed by the State of Wisconsin. Plaintiff does not allege that this funding or regulation encouraged or required the defendants' decision to discharge homosexual employees.

In *Kavka v. Edgewater Hospital, Inc.*, Dr. Stephen Kavka alleges that the hospital acted under color of state law in suspending him from the hospital staff for failure to self-insure against malpractice. This dismissal was alleged to be in violation of his rights to due process and equal protection secured by the Fifth and Fourteenth Amendments. State action, as formulated in the complaint, is supported by allegations of substantial state and federal funding to the defendant under Medicare, Medicaid, and the Hill Burton Act. Dr. Kavka does not allege any relation between the governmental funding and the hospital rule requiring staff physicians to maintain malpractice insurance. In plaintiff's memorandum in opposition to the defendants' motion to dismiss, and in his brief to this court, plaintiff expands the allegations of his complaint. He alleges that the State of Illinois in addition has undertaken to regulate the field of malpractice and has prohibited hospitals from using exculpatory clauses. Furthermore, he argues that the federal and state governments, in the course of regulating participants eligible for Medicare and Medicaid programs, have effectively approved the use of

the insurance requirement imposed by Edgewater.[2] But again, the plaintiff fails to demonstrate any relation between these actions of the State and the decision of the hospital.

In the third case, *Musso v. Suriano*, a dental student at Loyola University brought an action alleging that he was expelled by the University without a hearing, in violation of due process rights secured him by the Fifth and Fourteenth Amendments to the United States Constitution. It is argued that this expulsion was conducted under color of state law since Loyola receives substantial state and federal funding—allegedly fifty percent of its budget. Additionally, it is stated that the Illinois Department of Registration and Education monitors the curriculum and graduation requirements of the Dental School. Plaintiff, however, does not allege any impact of governmental funding on Loyola's decision not to provide plaintiff with a pre-expulsion hearing.

II

In two recent cases, *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1976), *cert. granted*, 46 U.S.L.W. 3803 (July 3, 1978), and *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976), this court outlined the elements of "state action" prerequisite to any 42 U.S.C. § 1983 civil

[2] Specifically, plaintiff charges that the Department of Health, Education and Welfare requires hospitals participating in Medicare and Medicaid programs to have an "effective governing body legally responsible for the conduct of the hospital" which has "adopted bylaws in accordance with legal requirements." 20 C.F.R. § 405.1021 (1977). Plaintiff deduces from this that by allowing Edgewater to participate in the programs, the government has concluded that Edgewater's malpractice regulation is necessarily in accord with "legal requirements." Plaintiff did not amend his complaint to reflect this theory of state action. Nevertheless, a remand on the issue is unnecessary since we do not accept plaintiff's construction of the HEW regulation, nor would plaintiff's construction satisfy the elements of state action discussed *infra*.

rights action.[3] *Cohen* and *Cannon*, fairly read, leave no doubt as to the prevailing legal requirements for a section 1983 claim. Nonetheless, actions are still being filed, as represented by the three complaints in issue here, without regard to the dictates of those decisions, necessitating another admonition concerning the allegations essential to establish state action.

The plaintiffs in each of these three actions on appeal support their allegation of state (or federal) action primarily through reliance on the distribution of substantial state and federal funds to defendants and the imposition of accompanying regulatory measures.[4]

The allegations of governmental funding and general regulation, standing alone, however, cannot support a finding of state action. The courts, including this one, have uniformly dismissed claims of state action grounded merely on governmental funding and regulation where neither has fostered the challenged activities of private health care facilities such as defendants Edgewater Hospital and Marion Heights, *Hodge v. Paoli Memorial Hospital*, 576 F.2d 563 (3d Cir. 1978); *Schlein v. Milford Hospital, Inc.*, 561 F.2d 427 (2d Cir. 1977); *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975); *Doe v.*

[3] 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

[4] The central question presented is that of action by particular states. Nonetheless, plaintiffs have also invoked federal action at various points in their argument. Since state and federal action share similar factual prerequisites, we do not afford a separate discussion of the relevant principles. *See Cannon v. University of Chicago*, 559 F.2d at 1071 n.8. But as we pointed out in *Cannon*, although state and federal actions must be viewed analogously, federal funding is not relevant to the existence of state action under section 1983. *Id.*

Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); *Mills v. Fox*, 421 F. Supp. 519 (E.D.N.Y. 1976) (nursing home); *Doyle v. Unicare Health Service, Inc.*, 399 F. Supp. 69 (N.D. Ill. 1975), *aff'd mem.*, 541 F.2d 283 (7th Cir. 1976) (nursing home), or of educational institutions such as defendant Loyola University. *Lamb v. Rantone*, 561 F.2d 409 (1st Cir. 1977); *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1976); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Spark v. Catholic University of America*, 510 F.2d 1277 (D.C. Cir. 1975); *Sanford v. Howard University*, 415 F. Supp. 23 (D.D.C. 1976), *aff'd mem.*, 549 F.2d 830 (D.C. Cir. 1977).

Cannon and *Cohen*, adhering to Supreme Court decisions in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), established that a claim under section 1983 must be based on no less than the state's "affirmative support" of the private conduct challenged. *Cannon v. University of Chicago*, 559 F.2d at 1069; *Cohen v. Illinois Institute of Technology*, 524 F.2d at 825-26. The Supreme Court's most recent opinion on state action, *Flagg Brothers, Inc. v. Brooks*, 46 U.S.L.W. 4438 (May 15, 1978), leaves open the question whether even "affirmative support" short of compulsion will suffice to render a private act attributable to the state.[5] The question need not be reached here, however, since plaintiffs have not established any degree of state encouragement of the challenged activity. Plaintiffs have not claimed that state regulations encouraged, or that state funds were conditioned upon, defendants' dismissal of homosexual employees, suspension of hospital physicians who refuse to carry malpractice insurance, or denial of hearings to dental students expelled for disciplinary reasons. Plaintiffs have failed to allege any "nexus." Dismissal of the complaints on that ground by the respective district courts was therefore proper.

[5] In *Flagg Brothers*, four justices voted to affirm the district court judgment that a warehouseman's proposed sale of bailed goods pursuant to a procedure provided in the New York Uniform Commercial Code § 7-210 was not state action. The opinion affirms on the ground that the proposed sale was neither a traditionally exclusive sovereign function nor a sale "compelled" by the state statute. Statutory permission of such a sale was considered insufficient nexus to render the action attributable to the state. The four dissenting justices, although suggesting that statutory authorization rather than compulsion might be sufficient, found state action by characterizing § 7-210 as the delegation of a function traditionally associated with sovereignty. It is also not clear whether actual compulsion would be required by the four affirming justices when the state activity might be characterized as an affirmative act rather than mere "inaction."

Plaintiffs argue that the level of state support of defendant institutions is so high that they are relieved of the necessity for pleading or proving a nexus, citing our decision in *Cohen*. We do not suggest that nexus is the exclusive means of establishing state action. *Cohen* and *Cannon* held that under certain limited circumstances the plaintiff need not establish a nexus between the state funding and/or regulation and the challenged act. The language of reservation in the cases cannot be extrapolated, as the plaintiffs have done here, however, to support the assertion that a high level of financial support, without more, gives rise to state action. The passage in *Cohen* cited by plaintiffs states that IIT "is not so heavily dependent on the State as to be considered the equivalent of a public university for all purposes and in all its activities," and then goes on to distinguish in a footnote cases of other courts where financial support was far greater. 524 F.2d at 825 & n.18.

The alternative to nexus referred to in *Cohen* sufficient to sustain a claim of state action is not simply a higher level of state support. Rather, nexus can be avoided only by an allegation of facts suggesting that the ostensibly private entity has acted as a state instrumentality or a "joint participant," in the language of *Burton v. Wilmington Park Authority*, 365 U.S. 715, 725 (1961). Such an allegation is dependent upon more than funding; it is dependent upon facts suggesting control. This interpretation of the *Cohen* reservation is buttressed by Judge (now Justice) Stevens' citation of *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968). *Cohen v. Illinois Institute of Technology*, 524 F.2d at 825 n.19. In *Powe*, Judge

Friendly found that the state of New York's comprehensive financing and administration of the New York State College of Ceramics allowed a finding of state action. Judge Friendly emphasized however that the State had concrete ability to control all the policies of the college, even though that control had not been specifically exercised in *Powe*. 407 F.2d at 83. Recent decisions premised on an instrumentality theory of state action support our conclusion here that mere allegations of state funding and general regulation, without some evidence of state administration or practical control, are insufficient. *See Chalfant v. Wilmington Institute*, 574 F.2d 739 (3d Cir. 1978) (en banc); *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978); *Braden v. University of Pittsburgh*, 552 F.2d 948, 965, 970 (3d Cir. 1977) (concurring opinion); *Hollenbaugh v. Carnegie Free Library*, 545 F.2d 382 (3d Cir. 1976); *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945). Thus, the complaints in the instant actions cannot be sustained on an instrumentality theory.

A third route to state action is also available by depicting the private activity as a public function. Plaintiff Batt relies heavily on this characterization of nursing homes. Whether measured by the test of a "traditionally exclusive state function" forwarded by the four justices writing the opinion for the court in *Flagg Brothers, Inc. v. Brooks*, 46 U.S.L.W. 4438, 4440 (May 15, 1978), or a function "traditionally and historically associated with sovereignty," adopted by the four dissenting justices, 46 U.S.L.W. at 4444, plaintiff's claim must obviously fail.[6] Care of the elderly and infirm has traditionally been a function associated with the family, not with sovereignty.

Finally, plaintiffs also challenge the procedural propriety of dismissal based on the insufficiency of the allegations. We are not imposing rigid pleading requirements. Plaintiffs' complaints simply fail to allege

[6] It should be noted that this circuit has used the exclusivity test. *See Anastasia v. Cosmopolitan National Bank of Chicago*, 527 F.2d 150, 157 (7th Cir. 1975), *cert. denied*, 424 U.S. 928 (1976).

any set of facts supporting the conclusion or inference that defendants have either acted as a state instrumentality, performed traditionally exclusive sovereign functions, or been compelled or even encouraged by the state to make the decisions challenged in these suits. Dismissal of the complaints was therefore appropriate. As we stated in *Cohen:*

> We agree that plaintiff is entitled to the fullest opportunity to adduce evidence in support of her claim. But she is not entitled to a trial, or even to discovery, merely to find out whether or not there may be a factual basis for her claim which she has not made. Her complaint omits any allegation of state support or approval of the defendants' discriminatory conduct, and the detailed facts set forth in the complaint, even if wholly true and liberally construed in her favor, do not warrant the conclusion that I.I.T. is a public university. It is clear beyond doubt that the claim which she has alleged does not entitle her to relief.

524 F.2d at 827.

In some cases, extensive discovery and trial will be necessary to adequately determine whether state action existed. *See Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977); *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975). But in cases such as these where plaintiffs' claim that state action, if present, has taken the form of statutes or regulations, it is entirely appropriate to resolve the issue on a motion to dismiss the complaint. The procedure has been affirmed by the Supreme Court in comparable cases. *Flagg Brothers, Inc. v. Brooks*, 46 U.S.L.W. 4438 (May 15, 1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).[7]

[7] The district court opinion affirmed in *Jackson* dismissed the complaint finding: "No state official participated in the practice complained of, *nor is it alleged* that the state requested or cooperated in the suspension of service." 348 F. Supp. 954, 958 (M.D. Pa. 1972) (emphasis added).

Furthermore, there is no showing that the plaintiffs in any of the actions requested to amend their complaints or to delay judgment on the motions until discovery had been completed. The judgments are affirmed.[8]

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[8] Plaintiff Kavka has requested this court to modify the district court judgment to reflect a dismissal without prejudice. We do not consider such a modification necessary since the order is phrased in jurisdictional terms, and a dismissal for insufficient allegations of state action is ordinarily construed as a dismissal for lack of subject matter jurisdiction in any event. *See Flagg Brothers, Inc. v. Brooks*, 46 U.S.L.W. 4438, 4439 (May 15, 1978); *Carter v. Telectron, Inc.*, 554 F.2d 1369 (5th Cir. 1977); *Schlein v. Milford Hospital, Inc.*, 561 F.2d 427 (2d Cir. 1977); *Sparks v. Catholic University of America*, 510 F.2d at 1281. FED. R. CIV. P. 41(b) clearly provides that a dismissal for lack of jurisdiction is a dismissal without prejudice. *Carter v. Telectron, Inc.*, 554 F.2d at 1370.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

PATRICK BATT
1628 North Franklin Place #22
Milwaukee, Wisconsin 53202,

Plaintiff, COMPLAINT

v.

MARION HEIGHTS, INC. Case No. 77-C-380
3333 West Highland Blvd.
Milwaukee, Wisconsin 53208,

SISTER LILLIAN VON DOMLEN,
SISTER ROSALIE KLEIN,
SISTER M. MEL O'DOWD,
SISTER ANGIOLA STICKELMAIER,
SISTER PEYTON RYAN,
DELORES GENCUSKI,
MRS. A. BOEHM,
JOHN CONWAY,
ROBERT HACKETT,
GERALD FALCI, and
ROGER N. HAMILTON
9024 North 70th Street
Milwaukee, Wisconsin,

Defendants.

Now comes the plaintiff, Patrick Batt, by his attorneys, Walther & Halling, and alleges and shows to the Court as follows:

JURISDICTION

1. This action seeks equitable relief and damages against defendants pursuant to 42 U.S.C.A. Sec. 1983 on the grounds that defendants' actions deprive plaintiff of freedom of speech and association, of the right to privacy, of equal protection of the laws, and the due process of the law, all in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

2. The jurisdiction of this court is based upon 42 U.S.C.A. Sec. 1983, 29 U.S.C.A. Sec. 1343, and 28 U.S.C.A. Sec. 1331. The amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

PARTIES

3. Plaintiff, Patrick Batt, is a citizen of the United States and resides at 1628 North Franklin Place, Milwaukee, Wisconsin 53202.

4. Defendant, Marion Heights, Inc., 3333 West Highland Blvd., Milwaukee, Wisconsin 53208, is a non-profit Wisconsin corporation operating a health care facility. At all material times, defendant Marion Heights, Inc., acted through its agents and representatives under color of state law.

5. Defendants, Sister Lillian Van Domlen, Sister Rosalie Klein, Sister M. Mel O'Dowd, Sister Angiola Stickelmaier, Sister Peyton Ryan, Delores Gencuski, Mrs. A. Boehm, John Conway, Robert Hackett, and Gerald Falci, are members of the Board of Directors of Marion Heights, Inc., and are sued individually, and in their capacity as members of the Board of Directors. At all material times defendant members of the Board of Directors of Marion Heights, Inc., acted under color of state law.

6. Defendant Roger N. Hamilton, 9024 North 70th Street, Milwaukee, Wisconsin 53223, is the administrator for Marion Heights, Inc. He is sued in his capacity as administrator and as an individual. At all material times defendant Hamilton acted under color of state law.

STATEMENT OF FACT

7. Defendant, Marion Heights, Inc., is a private, non-profit corporation, incorporated under the laws of the State of Wisconsin. As a health care facility it is subject to extensive regulation by the State of Wisconsin pursuant to Ch. 456, Wis. Stats., and the Wisconsin Administrative Code, Health & Social Services, H 32.

8. The majority of the operating funds for defendant Marion Heights, Inc., are provided by the U.S. Department of Health, Education

and Welfare, through the State of Wisconsin, in the form of medicare and medicaid benefits, pursuant to 42 U.S.C.A. Sec. 1395.

9. Defendant, Marion Heights, Inc., participates in the WIN Employment Training Program, funded by the United States Department of Labor, Manpower Administration and the State of Wisconsin, and administered by the State Department of Industry, Labor and Human Relations, pursuant to 28 U.S.C.A. Secs. 630-644.

10. The occupational and physical therapy programs at defendant, Marion Heights, Inc., health care facility are funded by the United States government, pursuant to 42 U.S.C.A. Sec. 1395.

11. Defendant Hamilton is licensed by the State of Wisconsin pursuant to Ch. 456 Wis. Stats. as a health care administrator.

12. From August 2, 1976, to May 6, 1977, plaintiff was employed by defendant Marion Heights, Inc., as personnel director. In that capacity, plaintiff was responsible for the recruitment, placement and employment of the work force throughout the nursing home, for the management of the employee relations program, for the coordination of the education and training program at the facility, for wage and salary administration, and for the internal audit program.

13. Under the supervision of defendant Hamilton, plaintiff had extensive and primary responsibility for the administration of state and federal programs and regulations:

A. Plaintiff was the affirmative action officer for the center and in that capacity he was responsible for compliance with

Equal Employment Opportunity regulations and for replying to EEOC complaints filed against defendant, Marion Heights, Inc.

B. Plaintiff was primarily responsible for the facility's compliance with all Occupational Safety and Health Administration regulations.

C. Plaintiff was primarily responsible for the administration of the WIN Program at the facility.

14. On May 6, 1977, defendant Hamilton, acting for defendant Marion Heights, Inc. and acting under the direction of the defendant Board of Directors, informed plaintiff that defendant Board of Directors had asked for his resignation. Defendant Hamilton stated that

the reason for the request was the objection of the Board to plaintiff's homosexual lifestyle. Plaintiff stated that he had no intention of quitting and would resist any effort to force his resignation, since he had been performing competently and had been guilty of no wrongdoing.

15. At all times during the course of his employment with Marion Heights, Inc., plaintiff performed his duties as personnel director in an exemplary fashion; at no time did his lifestyle intrude upon his duties. Furthermore, at no time was there any suggestion that plaintiff's performance as personnel director was less than completely satisfactory.

16. Some time later on May 6, 1977, plaintiff was called into defendant Hamilton's office and was again asked to resign. At that time, defendant Hamilton stated that defendant

Board of Directors was prepared to offer plaintiff one month's severance pay and a good performance recommendation in exchange for plaintiff's immediate resignation. When plaintiff refused to resign, defendant Hamilton fired him and told him to be out of the building by 5:00 p.m. that afternoon. When plaintiff requested a reason for his discharge, defendant Hamilton stated that the reason was his homosexual lifestyle. Plaintiff left the building at 7:30 p.m. on May 6, 1977.

CAUSES OF ACTION

17. At all material times, all defendants acted under color of state law to willfully deprive plaintiff of rights, privileges and immunities secured by the Constitution of the United States in the following respects:

A. Acting under color of state law, defendants deprived plaintiff of

freedom of speech and association as guaranteed by the First Amendment.

B. Acting under color of state law, defendants deprived plaintiff of the right to privacy as guaranteed by the First, Fourth, Ninth and Fourteenth Amendments.

C. Acting under color of state law, defendants deprived plaintiff of the right to due process of law and equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments.

WHEREFORE, plaintiff respectfully prays that the court assume jurisdiction in this case, and,

A. That a permanent injunction be issued

enjoining defendants, their agents, successors, employees, attorneys, and those acting in concert with them, or under their direction, from continuing or maintaining the policy of discriminating against plaintiff in employment on the basis of sexual preference, in contravention of his constitutional rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

B. That a permanent injunction be issued compelling plaintiff's reinstatement to his former position with defendant Marion Heights, Inc., or a comparable post, with back pay, and all other seniority and employment benefits.

C. That damages be awarded to plaintiff in the amount of $25,000.00.

D. That plaintiff be awarded actual attorneys fees pursuant to 28 U.S.C.A. Sec. 1988.

E. That such further relief be granted as the court may deem just and proper.

Respectfully submitted,

/s/ David L. Walther
David L. Walther

/s/ John Sundquist
John Sundquist

Attorneys for Plaintiff

WALTHER & HALLING
222 East Mason Street
Milwaukee, Wisconsin 53202
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1181

PATRICK BATT, Petitioner,

v.

MARION HEIGHTS, INC., SISTER LILLIAN VAN DOMLEN, SISTER ROSALIE KLEIN, SISTER M. MEL O'DOWD, SISTER ANGIOLA STICKELMAIER, SISTER PEYTON RYAN, DELORES GENCUSKI, MRS. A. BOEHM, JOHN CONWAY, ROBERT HACKETT, GERALD FALCI, and ROGER N. HAMILTON, Respondents.

BRIEF FOR RESPONDENTS

BRUCE C. O'NEILL

Attorney for Respondents

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622 North Water Street
Milwaukee, Wisconsin 53202
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1181

PATRICK BATT, Petitioner,

v.

MARION HEIGHTS, INC., et al, Respondents.

QUESTION INVOLVED

Whether the instant complaint was properly dismissed for failure to state a claim upon which relief can be granted under 42 U.S.C. sec. 1983 due to the complaint's failure to allege:

a). Any state involvement in the alleged discriminatory act;

b). Any symbiotic relationship between the state and the nursing home, or

c). Any performance of a public function by the nursing home?

STATEMENT OF THE CASE

The petitioner sued the respondents for a violation of 42 U.S.C. sec. 1983. The respondents moved to dismiss the complaint on the basis that it did not state a claim upon which relief could be granted and upon the basis that the district court lacked subject matter jurisdiction. The respondents' motion was directed toward the allegations in paragraphs 7 through 11 in the complaint that the respondents acted under color of State law.

The complaint alleges that:

(a) The respondent nursing home is extensively regulated by the State of Wisconsin (para. 7);

(b) The majority of operating funds for the respondent nursing home are provided

by the United States of America through the State of Wisconsin in the form of Medicare-Medicaid funds (para 8);

(c) The respondent nursing home participates in the WIN Employment Training program that is partially funded by the United States of America and partially funded by the State of Wisconsin and which is administered by the State of Wisconsin (para 9);

(d) The respondent nursing home has therapy programs that are funded by the United States of America (para. 10); and

(e) One of the individual respondents is licensed by the State of Wisconsin (para. 11).[1]

---

1 There are no allegations in the complaint that the nursing home received either Hill-Burton funds (42 U.S.C. sec. 291) or funds from the State of Wisconsin under Chapter 231 of the Wisconsin Statutes. Therefore, the references in petitioner's brief to Hill-Burton funds at pages 3 and 28-30 and to ch. 231, Wis. Stats. at page 22 should be disregarded.

The district court granted the respondents' motion and dismissed the action upon the basis that the complaint failed to state a claim upon which relief could be granted due to its failure to adequately plead State action. The district court's order was affirmed by the United States Court of Appeals for the Seventh Circuit as reported at 586 F.2d 59.

ARGUMENT

A claim for relief under sec. 1983 must embody two elements. The plaintiff first must show that he has been deprived of a right secured by the Constitution and the laws of the United States. The plaintiff secondly must show that the defendant deprived him of that right acting under color of state law. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978). In the present case the petitioner alleged that the Constitution secured to him the right to be free from discrimination based upon his sexual

preference to be a homosexual. He further alleged that the respondent nursing home deprived him of that right acting under color of state law.

The nursing home moved to dismiss upon the basis that, assuming arguendo that one has a constitutional right to be free from sexual preference discrimination, the complaint did not allege that the nursing home deprived him of such right acting under color of state law. The trial court dismissed the complaint, and the appellate court affirmed such dismissal upon the basis that the complaint did not allege state action.

In its decision herein the United States Court of Appeals for the Seventh Circuit set forth three different theories of state action under which one can plead a claim for relief under 42 U.S.C. sec. 1983. The court derived those theories from Mr. Justice Rehnquist's trilogy of state action opinions in Flagg Brothers, supra; Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Those

theories are: state involvement in the discriminatory act (nexus), state instrumentality (symbiotic relationship) and public function. The Seventh Circuit found the complaint of the petitioner herein to be insufficient under each of those theories.

The petitioner does not quarrel with the appellate court's delineation of the permissible theories of state action. The petitioner argues, however, that the court misinterpreted and misapplied each of those three theories with regard to the claim alleged in his complaint. He inexplicably presents his argument under the methodology of a 1974 case from the United States Court of Appeals for the Second Circuit, but his argument is essentially that the complaint adequately pleads state action under each of the three theories.

NEXUS

The complaint does not allege and the petitioner does not argue that the State of Wisconsin encouraged, approved, supported or was directly involved in the

nursing home's firing of the petitioner on the alleged basis of being a homosexual. The petitioner's only argument as to nexus appears at pages 13 and 14 of his brief. He argues that he administered various state and federal programs at the nursing home. This is of no relevance. It is the nexus between the State involvement in the nursing home's challenged activity (the alleged discrimination) that is crucial, not the nexus between the State involvement and the petitioner's duties for the nursing home. This court made that distinction clear in its three state action cases cited above.

In Moose Lodge a black guest was refused service in a private club's dining room because of his race. He correctly argued that he had been deprived of a constitutional right. He further argued that the deprivation was under color of state law, since the private club operated pursuant to a liquor license issued by Pennsylvania and was subject to detailed regulation by that state. This Court rejected the

"state action" claim and stated:

"The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Cause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatsoever.*** Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' Reitman v. Mulkey, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition." (407. U.S. at p. 173)

This Court further observed as follows:

"...there is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either

overtly or covertly to encourage discrimination." (407 U.S. at p. 173)

and

"...the Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club which it licenses to serve liquor." (407 U.S. at p. 175)

and

"...the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory practices of Moose Lodge." (407 U.S. at p. 176, fn. 3)

and

"However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination." (407 U.S. at pp. 176-77)

and

"...the operation of the regulatory scheme

enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge so as to make the latter 'State action' with the ambit of the Equal Protection Clause of the Fourteenth Amendment." (407 U.S. at p. 177)

In Jackson v. Metropolitan Edison Co., supra, this court, citing Moose Lodge, again set forth the need for nexus in a state action claim. In Jackson, a customer's electricity service had been terminated for alleged nonpayment without any notice, hearing or opportunity to pay. She argued that she had been deprived of a constitutional right and that such deprivation had been under color of state law. She supported the latter allegation by pointing to the facts that the utility was extensively regulated by Pennsylvania, that it was a monopoly protected by the state and that it received authorization and approval from the state as to its termination pro-

cedure through having filed a tariff containing such procedure with the state without any subsequent objection from the state. This Court rejected the state action claim and held that state regulation, even though detailed and extensive, did not convert the action of a private party into the action of the State. This Court stated that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. (419 U.S. at p. 351)

This Court held that there was an insufficient "relationship" and "connection" between the "challenged actions" and the monopoly status of the utility. (419 U.S. at p. 352)

This Court also held that the State's failure to disapprove the tariff containing the termination procedure was not state action, since the State had

not ordered the proposed practice. (419 U.S. at p. 357)

This Court noted that, "As in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972), there is no suggestion in this record that the Pennsylvania Public Utility Commission intended either overtly or covertly to encourage the practice." (419 U.S. at p. 357, fn. 17) This Court then stated, "We conclude that the State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for purposes of the Fourteenth Amendment." (419 U.S. at pp. 358-59)

In Flagg Brothers, supra, this Court, citing Jackson and Moose Lodge, again set forth the need for nexus in a state action claim. In Flagg Brothers the respondents' goods had been stored with a warehouseman, a dispute arose between them as to payment of the storage price and the warehouseman proposed to sell the goods as permitted by a New York statute.

The respondents argued that they were being threatened with a deprivation of a constitutional right by the warehouseman and that such deprivation was under color of state law. They supported the latter allegation by pointing to the state statute which permitted a warehouseman to sell stored goods to collect his storage price. They argued that New York "authorized and encouraged" the warehouseman's proposed action by enactment of the statute. (436 U.S. at p. 164) This Court rejected the state action claim under the nexus theory and stated as follows:

> "Respondents further urge that Flagg Brothers' proposed action is properly attributable to the State because the State has authorized and encouraged it in enacting sec. 7-210. Our cases state 'that a State is responsible for the... act of a private party when the State, by its law, has compelled the act.' Adickes, supra, at 170. This Court, however, has never held that a State's mere acquiescence in a private

action converts that action into that of the State. The Court rejected a similar argument in Jackson, supra, at 357:

'Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action''. (Emphasis added)

"The clearest demonstration of this distinction appears in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), which held that the Commonwealth of Pennsylvania, although not responsible for racial discrimination voluntarily practiced by a private club, could not by law require the club to comply with its own discriminatory rules. These cases clearly rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints

on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement'". (436 U.S. at pp. 164-65)

This Court concluded that, although New York 'permits' Flagg Brothers to sell the goods, it did not 'compel' it to sell those goods. (436 U.S. at p. 165)

In the present case there is no allegation or inference that can be drawn from any allegation that the State of Wisconsin encouraged or approved the firing of homosexuals much less that the State compelled such firing.

The decision of the Seventh Circuit is totally consistent with the three foregoing state action opinions of this Court. It is also consistent with its own other three recent state action opinions requiring a nexus to be pleaded between the state involvement and the challenged activity. See Cohen v. Illinois Institute of Technology, 524 F.2d

818 (7th Cir. 1975), cert. den. 425 U.S. 943 (1976), in which Justice Stevens wrote the opinion; Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976), reh. den. (1977), cert. granted on other grounds, --U.S.--, 98 S.Ct. 3142 (1978); and Cohen v. Illinois Institute of Technology, 581 F.2d 658 (7th Cir. 1978), cert. den. 47 U.S.L.W. 3497 (January 22, 1979).

It is also instructive to note that the oral argument to this Court on January 9, 1979 in the Cannon case by the attorneys for the parties and by the Solicitor General as reported at 47 U.S.L.W. 3471-72 (January 16, 1979), proceeded on the premise that there was no relief available to the petitioner under 42 U.S.C. sec. 1983.

See also McCoy, Current State Action Theories, the Jackson Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions, 31 Vanderbilt Law Review 785 (1978), where the author interprets this Court's recent state action opinions as

requiring a nexus between the state involvement and the challenged activity.

STATE INSTRUMENTALITY

As an alternative to the nexus pleading requirement and to the limited doctrine of public function, the Seventh Circuit recognized a state instrumentality theory of state action. This theory is nothing more than the symbiotic relationship theory of Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

The Seventh Circuit made clear that mere allegations of state funding and administration would not be sufficient under this theory. There would have to be allegations that the State controlled the private entity.

This Court has not found a symbiotic relationship type of state action since its decision in Burton in 1961. In Jackson, supra, this Court also cautioned that its decision in Burton may well be limited to its facts. This Court stated:

"We also find absent in the instant case the

symbiotic relationship presented in Burton v. Wilmington Parking Authority, 365 U.S. 705 (1961). There where a private lessee, who practiced racial discrimination, leased space for a restaurant from a state parking authority in a publicly owned building, the Court held that the State had so far insinuated itself into a position of interdependance with the restaurant that it was a joint participant in the enterprise. Id., at 725. We cautioned, however, that 'while a multitude of relationships might appear to some to fall within the Amendment's embrace,' differences in circumstances beget differences in law, limiting the actual holding to lessees of public property." (419 U.S. at pp. 357-58)

In Lucas v. Wisconsin Electric Co., 466 F.2d 638 (7th Cir. 1972), (en banc), cert. den. 409 U.S. 1114 (1973), the Seventh Circuit construed Burton as being a case involving 'state participation in the discriminatory act itself, and hence State

action...." (466 F.2d at p. 647, fn. 16). Similarly, in Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973), which involved a sec. 1983 lawsuit against a private Wisconsin hospital and its officials for denying use of the hospital's facilities for abortions, the Seventh Circuit distinguished Burton therein by holding that the State of Wisconsin was not a beneficiary of the hospital's rules in question and that the State could not be characterized as a joint participant in their adoption or enforcement therein. (479 F.2d at p. 761).

In reviewing the petitioner's brief herein as to the state instrumentality theory of state action, it must be noted that the brief refers to "public funding" and "governmental funding" as opposed to state funding. This is because his complaint alleges that the majority of funds for the respondent nursing home comes from federal funding.

Federal funding is not state action. In Cannon v. University of Chicago, supra, the Seventh Circuit stated at p. 1071, fn. 8 that, "The fact

that there is federal support cannot be used to create sec. 1983 jurisdiction." The court cited Blackburn v. Fisk University, 443 F.2d 121, 123 (6th Cir. 1971), inter alia, in support of the statement. In Blackburn the court stated as follows at p. 123:

> "'Inasmuch as the Civil Rights Act of 1871, 42 U.S.C. sec. 1983, is concerned only with state action and does not concern itself with federal action we lay to one side as entirely irrelevant any evidence concerning the participation of the federal government in the affairs of the University.'"

See also the decision of the Seventh Circuit herein at 586 F.2d at pp. 61-62, fn. 4 and Molinar v. Western Electric Co., 525 F.2d 521, 532 (1st. Cir. 1975), cert. den. 424 U.S. 978 (1976).

References to federal funds (e.g., the Hill-Burton Act, 42 U.S.C. sec. 291) in some sec. 1983 cases as part of the courts' state action analyses relate to the fact that the relevant federal act

requires State administration and regulation as to such funds. See, e.g., Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. den. 376 U.S. 938.

The only place in the complaint herein where there is reference to State funding is in paragraph 9, where it is alleged that the State partially funds the WIN program. (42 U.S.C. sec. 630 et seq.). In his brief the petitioner points out that the State also partially funds the Medicaid program. (42 U.S.C. sec. 1396 et seq.). Since the Medicare program (42 U.S.C. sec. 1395 et seq.) is funded totally by the United States of America, the petitioner properly makes no reference to that program.

How can the petitioner argue that the respondent nursing home has a symbiotic relationship with the State of Wisconsin on the one hand and that it receives the majority of its funds from the federal government on the other hand?

PUBLIC FUNCTION

The Seventh Circuit recognized public function as a third theory of state action. The petitioner argues, although he did not plead it, that the respondent nursing home comes within this theory.

In Flagg Brothers, supra, this Court reemphasized the "carefully confined bounds" of the public function doctrine, just as it had in Hudgens v. NLRB, 424 U.S. 507 (1976).

In Flagg the petitioner argued that the resolution of private disputes was a "traditional function" of state government and that New York had delegated that function to the warehouseman by enacting a warehouseman's lien statute. (436 U.S. at p. 157) The Court rejected this argument, since it did not include the concept of exclusivity inherent in the public function doctrine. The Court stated, "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State'". (436 U.S. at p. 158)

This Court noted that its past decisions where public function were found fell into two categories--elections and company towns-- and that they had in common "the feature of exclusivity". (436 U.S. at p. 159)

This Court observed that, in Hudgens, supra, it had overruled its prior decision in Amalgamated Food Employees Union v. Logan Valley Plaza, Inc, 391 U.S. 308 (1968). In the latter case, this Court had expanded the company town category to cover a private shopping center. This Court noted in Flagg that the Hudgens overruling of Logan Valley was based on the interpretation of Justice Black as to the limited reach of the public function doctrine. This Court quoted Justice Black as follows:

> "'The question is, Under what circumstances can private property be treated as though it were public? The answer that Marsh gives is when that property has taken on all the attributes of a town, i.e., 'residential buildings, streets, a system of sewers, a sewage disposal plant

and a 'business block' on which business places are situated.' 326 U.S. at 502.' 391 U.S., at 332 (Black, J., dissenting)." (436 U.S. at p. 159)

In Flagg this Court also limited its prior decision in Evans v. Newton, 382 U.S. 296 (1966), involving a recreational park, as follows:

"We think Newton rests on a finding of ordinary state action under extraordinary circumstances. The Court's opinion emphasizes that the record showed 'no change in the municipal maintainence and concern over this facility,' id., at 301, after the transfer of title to private trustees. That transfer had not been shown to have eliminated the actual involvement of the city in the daily maintenance and care of the park." (436 U.S. at p. 159 fn. 8)

This Court concluded by referring to the "carefully confined bounds" of the "sovereign function" doctrine. (436 U.S. at p. 163)

As noted by the Seventh Circuit herein, care for the elderly is not and never has been a function traditionally and exclusively reserved to the State. The Seventh Circuit did not hold that the public function doctrine was static and inflexible and applicable only to traditions rooted in the past. Traditions can change; but, even today, care for the elderly is not an exclusive function of the State. As in Flagg Brothers there are "private arrangements" that are commonly made for caring for the elderly.

CONCLUSION

The decision of the United States Court of Appeals for the Seventh Circuit herein is correct. Its affirmance of the dismissal of this action at the pleading stage need only be compared to this Court's affirmances of the dismissals at the pleading stage in Jackson and Flagg Brothers and in light of the paucity of the state action allegations in the complaint herein.

There are no special and important reasons for granting a writ of certiorari in this case. The

decision of the United States Court of Appeals for the Seventh Circuit herein does not conflict with any decision of this Court and does not conflict with any other decision of a court of appeals. The question of federal law herein has been settled by this Court in Flagg Brothers, Jackson and Moose Lodge.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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